APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,192

ALLSTATE INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, NATIONWIDE MUTUAL INSURANCE COMPANY, NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Appellants,*

versus

EDWIN S. LANIER, Commissioner of Insurance for the State of North Carolina, and T. WADE BRUTON, Attorney General of the State of North Carolina, *Appellees.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh

JOHN D. LARKINS, JR., DISTRICT JUDGE

(Argued February 11, 1966. Decided May 27, 1966.)

Before SOBELOFF, BOREMAN and BRYAN, *Circuit Judges.*

Howard Adler, Jr., (Herbert A. Bergson, Donald L. Hardison and J. Melville Broughton, Jr., and Broughton & Broughton, and Bergson & Borkland on brief) for Appellants, and Charles D. Barham, Jr., Assistant Attorney General of North Carolina, (Thomas Wade Bruton, Attorney General of North Carolina, on brief) for Appellees.

SOBELOFF, Circuit Judge:

The State of North Carolina maintains a system of automobile insurance regulation under which uniform rates and standards are promulgated upon the initiative of a rating bureau composed of all the insurance companies, whose proposals are then finally approved, modified or disapproved by the Commissioner of insurance. North Carolina

Gen. Stats. §§ 58-246-248.8 (1965). All companies selling insurance must adhere to the established rates and standards as a condition of doing business in the State. Deviations from the prescribed rates are permitted with the approval of the Insurance Commissioner, but since a 1961 amendment to the Act, his authority is restricted to authorizing upward deviations only. See *id.* § 58-248.2, as amended by 1961 North Carolina Session Laws, Ch. 1006. Thus, the individual companies are effectively precluded from competing through offering lower premium rates, although they may still offer dividend return features, improved services, etc.

Appellants, five large insurance companies doing 29% of the total business in North Carolina, filed suit in the District Court for the Eastern District of North Carolina to obtain a judgment declaring the statute invalid insofar as it restricts competition by prohibiting the offering of lower premium rates. They alleged that the North Carolina statute had been pre-empted by the provisions of the Sherman Act, 15 U.S.C.A. §§ 1-7 (1958), and the McCarran-Ferguson Act, 15 U.S.C.A. §§ 1011-15 (1958).[1] On cross-motions for summary judgment, the District Court dismissed the complaint on the ground that since the rating bureau was established and administered under the active supervision of the State, it was not subject to attack under the federal antitrust laws, which condemn only *private* noncompetitive activities. We think this ruling was correct.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), the Supreme Court held that the antitrust laws were inapplicable to an agricultural proration program which, while restricting

[1] The matter was heard in the District Court by a single District Judge. No suggestion was made that only a three-judge district court had jurisdiction to declare the North Carolina statute invalid. There is no doubt, however, that no three-judge district court is required to adjudicate an attack on a state statute on the ground that it has been pre-empted by an act of Congress. Swift & Co. v. Wickham, 382 U.S. 111 (1965).

competition among raisin growers and maintaining minimum prices, was established and actively supervised under the California Agricultural Prorate Act.

> "We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of *private* persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. * * * But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, *an unexpressed purpose to nullify a state control over its officers and agents is not lightly to be attributed to Congress.*" 317 U.S. at 350-51. (Emphasis added.)

The District Court's finding in the present case that the North Carolina rating bureau was operated under the active supervision of the State is not challenged in this court,[2] and

---

[2] The United States filed a memorandum in the District Court urging invalidation of the North Carolina program on the ground that it permitted the unsupervised establishment of minimum premiums by private companies. Compare Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F. 2d 502, 508-09 (4th Cir. 1959). Following the District Court's finding that establishment of rates was a governmental function, however, the United States has not joined in this appeal.

we find no merit in the distinction suggested by appellants between the injunction sought in *Parker* v. *Brown* and the declaration of pre-emption sought here. The central question in both cases is whether a program of regulation established and actively supervised by a state is subject to the antitrust laws. Absent congressional action departing from the rule of *Parker* v. *Brown,* the North Carolina statutory plan is clearly valid.[3]

Nothing in the 1945 McCarran-Ferguson Act or its legislative history suggests a limitation upon the principle of *Parker* v. *Brown.* The statute was passed in response to the Supreme Court's decision in *United States* v. *South-Eastern Underwriters Assoc.,* 322 U.S. 533 (1944) (hereafter *SEUA*), upholding an indictment against a group of private insurance companies charged with employing boycotts, coercion and intimidation to further a conspiracy to maintain noncompetitive premium rates. Because of earlier court decisions indicating that insurance was not part of commerce for the purpose of state regulation,[4] there was widespread fear that the *SEUA* case might endanger state autonomy in the regulation and taxation of the insurance business.

To allay these fears Congress declared in section 1 of the McCarran-Ferguson Act that

> "• • • the continued regulation and taxation by the several states of the business of insurance is in the public interest, and • • • silence on the part of Con-

---

[3] See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 303 (D. Mass. 1957), *aff'd mem.,* 242 F. 2d 758 (1957); Hitchcock v. Collenberg, 140 F. Supp. 894 (D. Md. 1956), *aff'd mem.,* 353 U.S. 919 (1957).

[4] See, *e.g.,* New York Life Ins. Co. v. Durlodge County, 231 U.S. 495 (1913); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869). These cases did not deal with the question posed in SEUA: Whether insurance was "commerce" falling within the regulatory powers of the federal government.

> gress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states."

Section 2a of the Act reinforces this precept by expressly subjecting insurance companies to state regulation,[5] and section 2b provides that unless a federal statute is made specifically applicable to the insurance business, it shall not "invalidate, impair or supersede" any state insurance law.[6] And while the antitrust laws were made applicable by section 2b to insurance companies,[7] the debates explicitly recognized the continuing vitality of *Parker* v. *Brown* and of state created and state supervised rating bureaus like the one now under consideration.[8]

---

[5] "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C.A. § 1012(a).

[6] 15 U.S.C.A. § 1012(b).

[7] *Ibid.* Similiarly, section 4 of the Act specified that the National Labor Relations Act, 29 U.S.C.A. §§ 151-167, and the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219, were applicable to insurance. 12 U.S.C.A. § 1014.

[8] Senator Ferguson, co-sponsor of the bill, declared

> "This bill would permit—and I think it fair to say that it is intended to permit—rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau. • • •" 91 Cong. Rec. 1481.

See also *Id.* at 1479 (Sen. Ferguson); 1480, 1481 (Sen. Murdock); 1480, 1485 (Sen. O'Mahoney, Senate conferee on the bill, citing with approval Parker v. Brown). The President expressed the same view: "The antitrust laws do not conflict with affirmative regulation of insurance by the States such as agreed insurance rates if they are affirmatively approved by State officials." *Id.* at 1479 (letter from President Roosevelt to Senator Radcliffe).

In short, the dominant purpose of Congress in passing the McCarran-Ferguson Act was to "give broad support to the existing and future state systems for regulating and taxing the business of insurance" and "to throw the whole weight of its power behind the state systems." *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429-30 (1946). The statute did no more than clarify the boundaries of state and federal jurisdiction over the insurance business, and in no wise sought to affect the controlling substantive principle of *Parker* v. *Brown*. We are concerned here with no scheme delegating sovereign authority to a private group, or authorizing purely private combinations in violation of the antitrust laws.[9] The North Carolina statute merely permits the carriers who belong to the rating bureau to propose rates but final authority to approve or disapprove is lodged in the Insurance Commissioner. On this basis, the District Court properly held that the statute was not subject to antitrust challenge. Whether the statutory plan embodies the wisest and most effective type of regulation is, of course, not a judicial question. The decision is

Affirmed.

---

[9] Compare, *e.g.*, Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F. 2d 502 (4th Cir. 1959); United States v. Maryland State Licensed Beverage Ass'n, 138 F. Supp. 685 (D. Md. 1956).

Filed May 27, 1966

Judgment

[Caption Omitted]

Appeal from the United States District Court for the Eastern District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

/s/ SIMON E. SOBELOFF
United States Circuit Judge.

APPENDIX B

Constitutional and Statutory Provisions

1. Article VI, Clause 2, of the United States Constitution, the "Supremacy Clause," provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.

3. Public Law 15, 79th Congress, 1st Session, Act of March 9, 1945, as amended by Public Law 238, Act of July 25, 1947, 15 U.S.C. §§ 1011-1015, sometimes referred to as the McCarran or McCarran-Ferguson Act, provides:

Section 1.

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 2.

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 3.

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, corecion or intimidation.

Section 4.

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Section 5.

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

4. The relevant provisions of the General Statutes of North Carolina provide as follows:

Section 58-247.

Membership as a Prerequisite for Writing Insursance; Governing Committee; Rules and Regulations; Expenses; Commissioner of Insurance Ex Officio Chairman.

Before the Commissioner of Insurance shall grant permission to any stock, nonstock, or reciprocal insurance company or any other insurance organization to write automobile bodily injury and property damage insurance in this State, it shall be a requisite that they shall subscribe to and become members of the North Carolina Automobile Rate Administrative Office.

* * * * * * * * * *

Section 58-248.2.

Insurance Policy Must Conform to Rates, etc., Filed by Rating Bureau; When Deviation Allowed.

No insurer, officer, agent or representative thereof shall knowingly issue or deliver or knowingly permit the issuance or delivery of any policy of insurance in this State which does not conform to the rates, rating plans, classifications, schedules, rules and standards made and filed by the rating bureau. A rate in excess of that promulgated by the rating bureau may be charged on any specific risk provided such higher rate is charged with the knowledge and written consent of both the insured and the Commissioner.

Section 58-248.3.

Revocation or Suspension of License for Violation of Article.

If the Commissioner shall find, after due notice and hearing that any insurer, officer, agent or representative thereof has violated any of the provisions of this article, he may issue an order revoking or suspending the license of any such insurer, agent, broker, or representative thereof.

Section 58-248.4.

Punishment for Violation of Article.

Any insurer, officer, agent or representative thereof failing to comply with, or otherwise violating any of the provisions of this article, shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than one hundred ($100.00) dollars nor more than five hundred ($500.00) dollars.

5. Section 1, Chapter 1006, 1961 Session Laws of North Carolina, amended Section 58-248.2 of the General Statutes of North Carolina by deleting therefrom three sentences which read as follows:

However, an insurer may deviate from the rates promulgated by the rating bureau provided the insurer has filed the deviation to be applied both with the rating bureau and the Commissioner, and provided the said deviation is uniform in its application to all risks in the State of the class to which such deviation is to apply; and provided such deviation is approved by the Commissioner. If approved the deviation shall remain in force for a period of one year from the date of approval by the Commissioner. Such deviation may be renewed annually subject to all of the foregoing provisions.